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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ALFONSO VALERIANO DE LA CRUZ, Defendant and Appellant.	C067947 (Super. Ct. No. 09F07147)

Can a vehicle that does not move significantly forward or backward, despite repeated efforts to make it do so, constitute a deadly weapon for purposes of assault? We say no. While a jury may make reasonable inferences based on circumstantial evidence, mere speculation that a lurching pickup truck might overcome its apparent disability, break free, and injure someone does not constitute substantial evidence of the present ability to commit a violent injury, as required to prove assault.

FACTUAL AND PROCEDURAL BACKGROUND

A jury found defendant Alfonso Valeriano De La Cruz guilty of six felonies and one misdemeanor. Defendant challenges one

of those verdicts: assault with a deadly weapon on a peace officer.

The alleged assault occurred late on September 21, 2009, after defendant shot a woman and drove away. After receiving a dispatch about the shooting, Sacramento County Sheriff's Deputy Robert White and his partner spotted defendant's pickup and followed it. Defendant led the deputies on a chase before crashing his pickup in a yard.

The deputies stopped one and one-half to two car lengths behind the pickup and ordered defendant out. Instead, defendant stayed inside, gunning the engine and shifting into drive and reverse gears repeatedly. The pickup lurched back and forth and the wheels spun and kicked up dirt, but appeared unable to actually travel in either direction.

Deputy White testified that the pickup "wasn't moving because, as you can see in the picture, the front left tire was busted and was underneath the vehicle." He testified further that when defendant put the pickup into gear, "the vehicle was lurching forward and backward" and "moved a little bit." Another deputy testified the front left wheel had broken off, the axle appeared to be snapped, and the truck likely was resting on the tire rim.

The deputies were parked in the pickup's backward path. They moved their patrol car because they feared the pickup might "potentially break free" and "ram right into us." After attempting several more times to put the truck into motion,

defendant eventually complied with the orders, left his vehicle, and was arrested.

A patrol car camera recorded the chase, crash, and events at the crash scene. The jury watched portions of the recording showing the pickup's obviously broken front wheel, spinning rear wheel, smoke and debris in the air, and slight lurching motion as defendant shifted gears and stepped on the gas. The recording showed defendant tried repeatedly to drive the pickup forward and backward without success. No additional evidence was presented to the jury regarding the truck's actual ability to travel any significant distance given its poor condition as described by the deputies.

An amended information charged defendant with seven felonies, including attempted murder, and one misdemeanor. The jury did not reach a verdict on the attempted murder charge and reached guilty verdicts on the other seven counts, including assault on a peace officer with a deadly weapon.

The trial court sentenced defendant to 32 years to life in prison, which included 16 months for the assault on a peace officer. Defendant timely appealed and raises two issues for review: present ability to assault and the imposition of jail booking and classification fees.

DISCUSSION

I

Present Ability To Assault

Defendant asserts the jury's finding of present ability to assault with his pickup was unsupported by substantial evidence.

He is correct. The evidence presented proved only that the pickup crashed, had a broken wheel, and demonstrably could not actually be driven in any direction, despite defendant's persistent efforts to move it and its admittedly intimidating lurching motion as defendant tried to get it moving. As such, the proof of the requisite present ability to commit assault on the two deputies behind the pickup was lacking.

A

The Governing Law

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, "'[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The court must view the entire record in the light most favorable to the judgment (order) to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the [defendant] guilty beyond a reasonable doubt. In making such a determination we must view the evidence in a light most favorable to respondent and presume in support of the judgment (order) the existence of every fact the trier could reasonably deduce from the evidence.'" (*In re Paul C.* (1990) 221 Cal.App.3d 43, 52, quoting *In re Oscar R.* (1984) 161 Cal.App.3d 770, 773.)

"Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial

evidence to support the verdict of the jury." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

Penal Code section 245, subdivision (c) provides that any person who assaults a peace officer with a deadly weapon or instrument likely to produce great bodily injury commits a felony. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.)

B

The Present Ability Element Of Assault

Unlike many other jurisdictions, which require only a subjective "'apparent'" present ability to assault, California applies an objective test for the present ability element to be satisfied. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 110.) The standard has survived the test of time. For an assault to occur, a defendant must have "a present ability of using actual violence against the person of another." (*People v. McMakin* (1857) 8 Cal. 547, 548.) The defendant must have "acquired the means and maneuvered into a location to immediately injure his victim." (*People v. Licas* (2007) 41 Cal.4th 362, 370, citing *Valdez*, at pp. 112-113.)

Accordingly, an unloaded gun will not provide present ability to commit an assault where it is not being used as a club or bludgeon. (*People v. Mosqueda* (1970) 5 Cal.App.3d 540, 544, citing *People v. Sylva* (1904) 143 Cal. 62, 64.) On the other hand, a moving vehicle can be a deadly weapon for purposes of assault. (*People v. Claborn* (1964) 224 Cal.App.2d 38, 42.)

"When an instrument is capable of being used in a dangerous or deadly manner and it may be fairly inferred from the evidence in a specific case that the defendant intended so to use it, its character as such a weapon is established." (*Ibid*.)

Our Supreme Court has stated that the present ability element to assault is satisfied when "'a defendant has attained the means and location to strike immediately.'" (*People v. Chance* (2008) 44 Cal.4th 1164, 1174, citing *People v. Valdez, supra,* 175 Cal.App.3d at p. 113.) "[I]t is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*Chance*, at p. 1171.)

The term "'immediately,'" therefore, need not mean "'instantaneously.'" (*People v. Chance*, *supra*, 44 Cal.4th at p. 1168.) The "present" descriptor in present ability "can denote 'immediate' or a point near 'immediate.'" (*Id*. at p. 1172, citing *People v. Ranson* (1974) 40 Cal.App.3d 317, 321.) In *Chance*, although the firing chamber in defendant's loaded gun was empty and he was mistaken as to the officer's location, present ability was satisfied because defendant quickly could have chambered a round and adjusted his aim. (*Id*. at pp. 1173, 1175-1176.) Similarly, in *People v. Ranson*, *supra*, at page 321, although the cartridge was jammed in the automatic rifle wielded by defendant, present ability was met because he could quickly unjam the rifle. Present ability is not negated when an intervening external circumstance prevents the possibility of injury. (*People v. Valdez, supra*, 175 Cal.App.3d at pp. 103,

113-114 [where defendant fired a loaded gun toward a victim who was behind bulletproof glass, present ability was not negated by the victim's ability to avoid injury].)

The People view the present situation as similar to the bulletproof glass in *Valdez*, i.e., the pickup's "apparent mechanical failure" constituted an "external circumstance that did not affect [defendant]'s personal ability to carry out the assault." The People also liken defendant's "disabled truck" to the jammed gun in *Ranson* that could be reloaded quickly, thereby satisfying present ability. (*People v. Ranson, supra*, 40 Cal.App.3d at p. 321.)

We disagree with the People's comparison of the disabled pickup to the bulletproof glass in *Valdez*. Here, defendant's pickup was the actual instrument of potential injury. Its mechanical problems were not an intervening external circumstance. Rather, the broken wheel was an integral part of the "weapon" itself, and no proof was presented that the truck was immediately capable of backing into the officers despite its broken wheel. Instead, all evidence pointed to the contrary conclusion that the truck was incapable of significant and immediate movement.

We likewise reject the comparison to the loaded but jammed gun in *Ranson.* In *Ranson*, the court found the temporal requirement for present ability to be somewhat flexible. "Time is a continuum of which 'present' is a part. 'Present' can denote 'immediate' or a point near 'immediate.'" (*People v. Ranson*, *supra*, 40 Cal.App.3d at p. 321.) There, although the

rifle was jammed, the evidence showed the weapon was loaded and operable, and defendant knew how to take off and quickly reinsert the clip to dislodge the jammed cartridge. This was "near enough" for the *Ranson* court to find present ability to assault. (*Ibid.*)

In contrast, here the alleged "weapon" was the pickup truck and no evidence was presented to show defendant had the knowledge and ability to repair his vehicle rapidly enough to get it moving again in the "'immediate'" moment or "a point near 'immediate,'" as required by *Ranson* and *Chance*. While there is some elasticity in the temporal element of present ability to assault, it would be an improper stretch to find here that defendant was "near enough" to meet the *Ranson* fix-it-fast exception for present ability, given the lack of any evidence that he knew how and was able to quickly repair or somehow reposition or reconfigure his vehicle to make it mobile.

The People also argue that, despite the pickup's "apparent mechanical failure," defendant still had the present ability to assault the deputies because "he had obtained the means and location to inflict injury on the officers." This argument is undermined by the People's own admission: "[B]ut for mechanical failure, his very next movement would have completed the battery." As the People thus acknowledge, the pickup had suffered mechanical failure and the People presented no evidence that it was able to move as required to approach the officers despite that failure.

In making this "but-for" argument, the People note that the testimony did not reveal "just exactly why the truck didn't move more than a 'lurch.'" The People miss the point: the evidence showed the truck was only able to "lurch," and the People failed to present evidence that showed the truck was capable of movement beyond lurching.

Nonetheless, the People argue that an assault occurred because defendant attempted to put the pickup into gear and because the deputies moved farther back. These are facts in evidence, yes. They do not, however, constitute substantial evidence to support a finding of actual present ability by defendant to use his pickup as a deadly weapon under our objective standard. The deputies were working under stressful conditions. Defendant was gunning the engine and the spinning rear wheel was throwing up dirt and debris. From where they stood, the deputies became concerned the pickup might somehow move backwards, prompting them to move their car out of the way. While such concern may be understandable in the heat of the moment, it amounted to no more than speculation. The fact that the deputies would rather be safe than sorry does not -- in itself -- constitute substantial evidence that the pickup actually could move, given the totality of the evidence.

We are mindful of our Supreme Court's admonishment in *People v. Rodriguez* (1999) 20 Cal.4th 1, 12 to avoid appellate fact-finding when reviewing a judgment. In *Rodriguez*, the appellate court reversed an assault conviction, holding there was insufficient evidence the gun used by defendant had been

loaded or that defendant attempted to use it as a bludgeon. (*Id.* at p. 12.) Our Supreme Court reversed, holding the jury reasonably could have inferred the gun was loaded because evidence showed defendant had threatened the victim, had shot someone else the day before, and logically -- as a gang member -- would not have carried an unloaded gun in an area of known gang violence. (*Ibid.*) Defendant's own volitional acts, therefore, provided a reasonable basis for the jury's conclusion. (*Id.* at p. 13.)

We have a distinctly different situation here because the inference at issue -- that the pickup was operable and able to be driven by defendant into the deputies -- was directly contradicted by visual evidence of its struggles to move and failure to accelerate despite defendant's volitional acts. In *Rodriguez*, it was reasonable to infer the gun could have been loaded. Here, it would have been reasonable to infer there was gas in the tank and a functioning electrical system under the hood, but it was not reasonable to infer the pickup could become a mobile deadly weapon in the present moment, given the complete lack of evidence presented to show the truck capable of significant movement.

Our Supreme Court restated California's substantial evidence standard in *People v. Johnson* (1980) 26 Cal.3d 557, 576. In doing so, the court relied on *Estate of Teed* (1952) 112 Cal.App.2d 638, which sought to determine the meaning of the word "substantial" in the substantial evidence rule by reviewing

dictionary and judicial definitions.[1] *Estate of Teed* summed up its review by stating: "The sum total of the above definitions is that, if the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Teed*, at p. 644.)

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[1] "Webster's International Dictionary defines the word as follows: 'Consisting of, pertaining to, of the nature of or being, substance, existing as a substance; material.' Its meaning is further defined as 'not seeming or imaginary, not illusive, real, true; important, essential, material, having good substance; strong, stout, solid, firm.' The word means 'considerable in amount, value or the like; firmly established, solidly based.' Synonyms are 'tangible, bodily, corporeal, actual, sturdy, stable.' [¶] 'Substantial evidence,' according to Words and Phrases, Fifth Series, page 564, where many definitions are collected, is evidence 'which, if true, has probative force on the issues.' It is more than 'a mere scintilla,' and the term means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion,' citing *Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197 [59 S.Ct. 206, 83 L.Ed 126]. To preclude a reviewing court from disturbing a verdict, it is essential that the supporting evidence be 'such as will convince reasonable men who will not reasonably differ as to whether evidence establishes plaintiff's case,' quoting from *Morton v. Mooney,* 97 Mont. 1 [33 P.2d 262]. And as said in *Missouri Pac. R. Co. v. Hancock,* 195 Ark. 414 [113 S.W.2d 489], 'improbable conclusions drawn in favor of a party litigant through the sanction of a jury's verdict will not be sustained where testimony is at variance with physical facts and repugnance is material and self-evident.'" (*Estate of Teed*, *supra*, 112 Cal.App.2d at p. 644.)

In addition to affirming *Estate of Teed*'s meaning of "substantial," Johnson emphasized that a reviewing court must conduct its appraisal "in the light of the whole record" and not limit its review to "isolated bits of evidence selected by the respondent." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577.)

Applying a substantial evidence rule that stresses the importance of isolated evidence to support a judgment may risk "misleading the court into abdicating its duty to appraise the whole record. As Chief Justice Traynor explained, the 'seemingly sensible' substantial evidence rule may be distorted in this fashion, to take 'some strange twists.' 'Occasionally,' he observes, 'an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law.' (Traynor, The Riddle of Harmless Error (1969) p. 27.) (Fns. omitted.)" (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577-578.)

A court is not required to "blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal 'was not created . . . merely to echo the

determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.'" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633, citing *Bowman v. Board of Pension Commissioners* (1984) 155 Cal.App.3d 937,944.)

Here, we would be reaching the type of "dubious conclusion" against which Chief Justice Traynor cautioned if we credited the pickup's minimal lurching motions and the deputies' subjective concern about the pickup "breaking free" as sufficient evidence of present ability to assault, while disregarding the visual evidence showing the truck's inability to break free.

Here, it is true the pickup appeared to be functioning well before crashing, and its engine and lights remained operational after the crash. It is true, also, that defendant stayed behind the wheel, shifted the pickup into drive and reverse gears, and gunned the engine repeatedly. This caused the pickup to lurch and move "a little bit" and the deputies to feel unsafe enough that they moved their patrol car farther back. It did not, however, cause the pickup to actually move from its position.

The testimony and the recording that the jury watched clearly showed defendant was unable to get his vehicle moving again. At best, the jury's conclusion that defendant had the present ability to strike the deputies was based on the same speculative notion adopted by the deputies that the pickup might somehow "break free" from its crashed position. As the court explained in *Roddenberry*, "[s]peculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996)

44 Cal.App.4th 634, 651.) The prosecution needed to prove beyond a reasonable doubt that the pickup could move enough to reach the deputies. Like a gun without bullets, the truck without the apparent ability to back up could not provide "a present ability of using actual violence against the person of another," as we have required as an element of criminal assault since the time of *McMakin*.[2]

II

Jail Booking Fee And Classification Fee

The court imposed upon defendant a $270.17 jail booking fee and a $51.34 jail classification fee.[3] Defendant did not object to the fees at the time they were imposed. Defendant seeks to strike the fees, which were imposed pursuant to Government Code section 29550.2. He contends the trial court did not have sufficient evidence of his ability to pay. Defendant believes his challenge is preserved on appeal even though he failed to object to the imposition of the fees in the trial court. We disagree.

Under the general waiver doctrine, "contentions not raised in the trial court will not be considered on appeal." (*People*

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[2] Because there was no substantial evidence of present ability, we do not reach defendant's other contentions that he did not have the requisite knowledge and intent to commit assault on the peace officers. Without a functioning "weapon," those become moot questions.

[3] The court referred to the fines as $270 and $51 during sentencing.

v. Gibson (1994) 27 Cal.App.4th 1466, 1468.) The waiver doctrine is "founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law." (*Ibid.*)

This court has held that the waiver rule applies to the imposition of a booking fee pursuant to Government Code section 29550.2. (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357, citing *People v. Gibson, supra*, at p. 1468 [waiver doctrine applies where defendant failed to object in trial court to insufficient evidence supporting his ability to pay a restitution fine] and *People v. Welch* (1993) 5 Cal.4th 228, 234 [waiver doctrine applies to a first-time-on-appeal challenge to a probation condition imposed at sentencing where defendant failed to object in trial court].)

Defendant relies on *People v. Pacheco* (2010) 187 Cal.App.4th 1392, which held a defendant's failure to raise an objection in the trial court on his ability to pay court-appointed attorney fees does not preclude a challenge on appeal based on insufficient evidence. (*Id.* at 1397.) The *Pacheco* court relied on two cases that held an attorney fee order is not barred from a first-time challenge on appeal -- *People v. Viray* (2005) 134 Cal.App.4th 1186, 1214-1217 [waiver exception justified by the inherent conflict of interest between defendant and his attorney in such situations] and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537 [waiver exception justified where statute requires a finding of unusual circumstances before

defendant can be ordered to pay attorney fees]. (*Pacheco*, at p. 1397.)

The *Pacheco* court applied the *Viray-Lopez* waiver exception not only to the attorney fees at issue in *Pacheco*, but also to two other types of fees -- jail booking fees and probation fees -- because "[r]espondent offers nothing to convince us otherwise." (*People v. Pacheco*, *supra*, 187 Cal.App.4th at p. 1397.) Without more to explain the *Pacheco* court's underlying reasoning, we decline to apply its holding to the jail booking fees here.

Defendant's only argument why the rule of this court under *Hodges* should not apply is a thin one: That Penal Code section 987.8, which provides for the attorney fees at issue in *Pacheco*, *Viray*, and *Lopez* is "similar in form" to Government Code section 29550.2, which provides for the booking fees here. In fact, *Viray* and *Lopez* established the forfeiture exceptions for attorney fees because they are distinguishable from other types of appeals the courts bar under the waiver doctrine.

We see no reason to depart from this court's rule in *Hodges.* Defendant's belated claim thus fails.

DISPOSITION

Defendant's conviction of assault with a deadly weapon on a peace officer is reversed, but the remainder of defendant's

convictions are affirmed. The case is remanded to the trial court for resentencing.

ROBIE, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.